Strangers in a Strange Land: The Threat to Consular Rights of Americans Abroad After *Medellín v. Texas*

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"You're only an American in America."[1]

I. INTRODUCTION

In 1993, two Texas teenage girls were raped and murdered; police arrested the suspect José Ernesto Medellín, who confessed, was convicted, and sentenced to die.[2] But what started as a (seemingly) straightforward criminal case became a case of conflicting authorities: international law collided with state law, and presidential authority with state sovereignty. The conflict: Medellín was a Mexican citizen, entitled to access to the Mexican consulate upon his arrest under the Vienna Convention of Consular Rights.[3] The Texas authorities did not inform him of this, and on this basis he appealed. He ultimately lost on March 25, 2008, when a five-four split Supreme Court held in *Medellín v. Texas* that the United States' participation in the VCCR did not trump Texan authority to conduct its business (including conducting executions).[4] In effect, the United States failed in its obligations under the VCCR and could not guarantee compliance with the treaty at the state level. Commentators and the dissenters criticized this decision, raising concerns that this total disregard for the VCCR would expose Americans abroad in foreign countries to abuse and danger if arrested and denied any contact with the American consulates.[5]

Fast forward to 2009. Stories of Americans arrested in other countries are nothing new, but they seem to be a prominent and frequent issue facing the United States, one year after the release of the decision of *Medellín*. Since the decision was released, several high-profile stories of Americans imprisoned or arrested in foreign nations have occurred.[6] Some have recently resulted in

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[1] PETER LAUFER, NIGHTMARE ABROAD: STORIES OF AMERICANS IMPRISONED IN FOREIGN LANDS 59 (1993).

[2] Medellín v. Texas, 128 S. Ct. 1346, 1354 (2008).

[3] Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

[4] *Medellín*, 128 S. Ct. at 1361.

[5] *See* Torres v. Oklahoma, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005); Brief Amicus Curiae of Ambassador Bruce Laingen, et al., in Support of Petitioner at 12, Medellín v. Dretke, 544 U.S. 660 (2005) (No. 04-5928) [hereinafter Laingen brief]; Kenneth Williams, *Does the ICJ's Decision in Avena Mean Anything to Mexicans on Death Row?*, 55 CATH. U. L. REV. 351, 370 (2006); John Greiner, *Henry Commutes Death Sentence*, THE OKLAHOMAN, May 14, 2004, at 1A.

[6] *See, e.g.*, Rachel Donadio, *American Testifies in Her Murder Trial in Italy*, N.Y. TIMES, June 13, 2009, at A4 (on the murder trial of American student Amanda Knox, who was studying abroad in Italy, and her testimony at trial in June 2009); Nazila Fathi & Mark Landler, *In Turnabout, Iran Releases U.S. Journalist*, N.Y. TIMES, May 12, 2009,

fortunate outcomes, such as former President Bill Clinton's success in securing Euna Lee and Laura Ling's release from North Korea.[7] However, the frequency and urgency of these recent cases illustrate that the concern voiced by the critics and dissenters of *Medellín* is a well-founded one: whenever an American journalist, student, or ordinary tourist is arrested, he or she needs assistance, and it is not feasible to send high-profile emissaries such as President Clinton to assist them all. Consular notification under the VCCR after *Medellín* is now even more relevant.

This Note focuses on the *Medellín* majority's failure to make one important distinction. In the United States, the VCCR has been invoked as desperate last measures by foreign defendants facing the death penalty when all other judicial means had been exhausted. For foreign defendants not facing the death penalty, the constitutional safeguards of the American criminal justice system guarantee due process protection. But an American citizen arrested in a foreign country is not entitled to the protections of the American criminal system. There are no guarantees of due process, of the right to counsel, the right against self-incrimination, the right to a speedy public trial, or any of the other rights Americans have long enjoyed. Instead, the American prisoner faces possible abuse, corruption, and violation of his basic human rights. He faces hard labor, unsanitary conditions, physical abuse, or solitary confinement. An American arrested abroad will need all of the protections the VCCR can afford him; this is true whether he is facing the death penalty or a year's imprisonment. However, the majority in *Medellín* failed to take this into consideration.

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at A1 (on Iranian-American journalist Roxana Saberi's imprisonment in Iran); Ian Fisher, *Grisly Murder Case Intrigues Italian University City*, N.Y. TIMES, Nov. 13, 2007, at A4. Italy is a signatory to the VCCR and the Optional Protocol, which are discussed *infra* Part II.A. *See also, e.g.*, Jennifer Steinhauer & Rebecca Cathcart, *An Intimate Homecoming Is Played out in Public*, N.Y. TIMES, Aug. 6, 2009, at A13 (on the release of American journalists Euna Lee and Laura Ling from North Korea).

More and more journalists are taking on increasingly risky assignments abroad for smaller news media outlets that operate primarily via the Internet; when these journalists are arrested by local authorities, they lack the large support network, connections, and resources of established, major news organizations who can leverage for their release. *See* Brian Stelter, *A World of Risk for a New Brand of Journalist*, N.Y. TIMES, June 15, 2009, at B1.

[7] Because this Note focuses on the VCCR and Optional Protocol, and on consular relations, it does not focus on situations where Americans were arrested in a non-signatory nation (such as North Korea) or a nation that does not maintain normalized relations with the United States (which includes North Korea and Iran). But even in cases such as those, customary international law could still apply, and it is worth noting these situations even if it involves nations that are not signatories or do not maintain normal relations with the United States.

This Note highlights why this distinction matters for Americans who live or travel abroad. Part II presents the background information necessary to understand the procedurally complex *Medellín*. Part III attempts to capture a snapshot of the American presence overseas by looking at consular functions and trends of American movement abroad, to illustrate why this is not a small issue. In Part IV, two nations in particular, Mexico and Japan, are examined in detail to illustrate what circumstances would be like should an American be arrested in either country.[8] Part V examines how this issue could be resolved, and Part VI concludes this Note.

II. THE ROAD TO *MEDELLÍN V. TEXAS*

A. *The Vienna Convention on Consular Relations and the Optional Protocol*

Early in the development of consular relations law, the United States was influential in guiding the direction of the development of international norms. Although similar in some respects, consular law and diplomatic law are substantively different areas of international law and are codified in different multilateral treaties.[9] The treaties at the heart of the dispute in *Medellín* that govern consular relations are the Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes.[10] Prior to the VCCR, there was no uniform regulation of consular

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[8] Mexico and Japan were selected for this Note for the following reasons: both are signatories to the VCCR and the Optional Protocol, both have large populations of American residents and visitors within their borders, and both have criminal justice systems that have been criticized and faulted by human rights groups. *See infra* Part IV.A and IV.B. However, the concerns regarding Mexico and Japan's treatment of American detainees could be extended to many other nations with which the United States has exchanged diplomatic and consular agents.

[9] For example, diplomatic agents are immune "from arrest, detention, criminal process, and, in general, civil process in the receiving state." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 (1987). Consular agents are similarly immune only "in respect of acts or omissions in the exercise of the officer's official functions." *Id.* at § 465. Thus, consular immunity does not extend as far as diplomatic immunity. Consular agents handle routine tasks such as issuing travel documents and developing ties and relations with the receiving state but do not handle official communications between the sending and receiving state. James E. Hickey, Jr., & Annette Fisch, *The Case to Preserve Criminal Jurisdiction Immunity Accorded Foreign Diplomatic and Consular Personnel in the United States*, 41 HASTINGS L.J. 351, 368–69 (1990).

[10] Optional Protocol Concerning the Compulsory Settlement of Disputes, Mar. 19, 1967, 596 U.N.T.S. 487 [hereinafter the Optional Protocol]; VCCR, *supra* note 3.

relationships, although norms in consular agreements had developed into customary international law, in the form of bilateral agreements, informal agreements, and the national laws of various nations.[11] Between the end of World War II and the codification of consular law by the United Nations, nations would form treaties using a previous treaty as a model; treaties conducted by the United States and the United Kingdom were the most predominantly used models.[12] The similarity of provisions in the modeled treaties led to regional codification of consular law.[13] When the Soviet Union entered into a consular treaty with East Germany in 1957, it was the beginning of another model for treaties, this time codifying consular law among Communist nations.[14]

The International Law Commission recommended that a young United Nations codify consular law and practices.[15] The first draft, started in 1955, took five years to complete, culminating in the 1963 United Nations Conference on Consular Relations and the VCCR.[16] Among other things, the convention called for the regulation of the establishment and functions of a consulate,[17] consular privileges and immunity,[18] and obligations of a receiving state to the consular offices of the sending state.[19] Cognizant of the benefits the VCCR offered to Americans who travel abroad, the United States was one of the leading proponents behind both the VCCR and the Optional Protocol and was actively involved in the drafting of the treaties,[20] arguing that no country should disregard the obligation to notify a foreign national's consulate of the national's arrest.[21]

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[11] Laingen brief, *supra* note 5, at 6.

[12] LUKE T. LEE & JOHN QUIGLEY, CONSULAR LAW AND PRACTICE 18 (3d ed. 2008).

[13] *Id.* at 20.

[14] *Id.*

[15] *Id.* at 22. For more on the functions and assistance of consular offices for American citizens, see *infra* Part III.B.

[16] LEE & QUIGLEY, *supra* note 12, at 22.

[17] VCCR, *supra* note 3, arts. 2–5.

[18] *Id.* art. 58.

[19] *See, e.g.*, *id.* art. 28 (receiving state under duty to accord sending state facilities for consular functions); *id.* art. 31 (pertaining to the sending state's consular office's premises). The sending state is "the country from which a diplomatic agent or consul is sent abroad." BLACK'S LAW DICTIONARY 1539 (9th ed. 2009). Conversely, the receiving state is "the country to which a diplomatic agent or consul is sent" by the sending state. *Id.*

[20] Laingen brief, *supra* note 5, at 8–9.

[21] LEE & QUIGLEY, *supra* note 12, at 144.

Article 36 of the VCCR provides for situations where the consulate of a sending state may communicate with and assist its foreign national arrested within the boundaries of the receiving state.[22] If a Mexican national is arrested in the United States, then (according to the language of the treaty) local law enforcement would be under certain obligations to allow communication between the Mexican national and the Mexican consulate. Article 36(1)(b) imposes on the receiving state duties that all must be performed "without delay," while Article 36(1)(c) grants the consular office of the sending state the right to visit and communicate with its imprisoned national.[23]

The Optional Protocol is an addendum to the VCCR, providing that disputes between signatory nations arising out of claims related to the VCCR (including Article 36) fall under the compulsory jurisdiction of the International Court of Justice (the ICJ, also known as the World Court).[24] As of 2008, 171 states had ratified or acceded to the VCCR, with many non-signatory states considering the VCCR as declaratory of international law.[25] The United States ratified both the VCCR and the Optional Protocol in 1969.[26] Years later, in 1985, the nation withdrew from the general jurisdiction of the International Court of Justice, but it still remained subject to the ICJ's jurisdiction specifically for VCCR disputes through its

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[22] VCCR, *supra* note 3, art. 36. Specifically, article 36(1)(b) states:

> [T]he competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

Article 36(1)(c) provides for further rights:

> [C]onsular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

[23] *Id.* art. 36(1)(b).

[24] Optional Protocol, *supra* note 10, art. I.

[25] LEE & QUIGLEY, *supra* note 12, at 25.

[26] United Nations Treaty Collection, http://treaties.un.org/Pages/Treaties.aspx?id=3&subid=A&lang=en (click on the link for Item 6 for the VCCR; click on the link for Item 8 for the Optional Protocol) (last visited Mar. 13, 2009).

ratification of the Optional Protocol.[27] Up until 2004—when Mexico haled the United States before the ICJ in *Case Concerning Avena and Other Mexican Nationals*[28]—the United States had invoked and relied upon the ICJ's jurisdiction more than any other state in the world.[29]

The following table allows for comparison as to which nations are currently signed onto the VCCR, and which are signed onto the Optional Protocol. Currently there are 172 parties to the VCCR and forty-eight to the Optional Protocol.[30]

Table 1: Noteworthy Signatories to the VCCR and the Optional Protocol.[31]

Country	**VCCR Ratification**[32]	**Optional Protocol Ratification**	**Withdrawal from Optional Protocol**
United States	November 1969	November 1969	March 7, 2005
Mexico	June 1965	Acceded March 2002	None listed
Japan	Acceded[33] October 1983	Acceded October 1983	None listed
United Kingdom	May 1972	May 1972	None listed
China	Acceded July 1979	Never	N/A
Canada	Acceded July 1974	Never	N/A
Australia	February 1973	Acceded February 1973	None listed
Iraq	Acceded January 1970	Never	N/A

[27] *Medellín*, 128 S. Ct. at 1354.

[28] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) [hereinafter *Avena*]. The case is discussed extensively *infra* Part II.C.3.

[29] Laingen brief, *supra* note 5, at 10.

[30] United Nations Treaty Collection, *supra* note 26.

[31] *Id.*

[32] Date of ratification of the treaties, unless otherwise noted.

[33] According to the UNTC website, "accession" is defined in articles 2 and 15 of the Vienna Convention on the Law of Treaties: "the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force." United Nations Treaty Collection, *supra* note 26.

B. *The International Court of Justice*

Located at The Hague, the ICJ was inaugurated in 1946 as the successor of the previous global judicial body, the Permanent Court of Justice, and serves as the main judicial body of the United Nations.[34] The founding document of the ICJ, the Statute of the Court, is directly incorporated into the Charter of the United Nations; ipso facto, all members of the United Nations are also parties to the Statute.[35] The ICJ decides on cases in which only countries are parties; it does not hear cases involving individuals or organizations as parties, and it does not hear criminal cases.[36] Most importantly, before the ICJ has jurisdiction over a case, the parties must have consented to submitting the dispute to the court, and the decisions are binding only on the parties in that particular dispute; they are not binding precedent.[37]

As discussed below, the Supreme Court held in *Medellín* that ICJ decisions are binding only on the United States as a nation, not domestically within the United States.[38] In finding the ICJ decision in *Avena* not binding on state and local courts within the United States, Chief Justice Roberts incorrectly noted that no nation treats ICJ judgments as binding in domestic courts.[39] That is not the structure of the ICJ, since ICJ decisions are binding only upon the nations acting as parties in a dispute for that particular dispute;

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[34] ARTHUR EYFFINGER, THE INTERNATIONAL COURT OF JUSTICE 98–99 (1996); HOWARD N. MEYER, THE WORLD COURT IN ACTION: JUDGING AMONG THE NATIONS 94 (2001); Susan W. Tiefenbrun, *The Role of the World Court in Settling International Disputes: A Recent Assessment*, 20 LOY. L.A. INT'L & COMP. L. REV. 1, 4 (1997).

[35] ROSENNE'S THE WORLD COURT, WHAT IT IS AND HOW IT WORKS 15 (Terry D. Gill ed., Martinus Nijhoff Publishers, 6th ed. 2003). This does not mean necessarily that the ICJ automatically has jurisdiction over the states. *See supra* Part II.A on the United States's jurisdictional status under the ICJ.

[36] ROSENNE'S THE WORLD COURT, *supra* note 35, at 23, 30. Criminal cases are handled by the International Criminal Court, constituted in 2002. *See* The International Criminal Court, http://www.un.org/News/facts/iccfact.htm (last visited Mar. 13, 2009). Many of the cases discussed in this Note originated as criminal cases domestically in the United States and came before the ICJ through the Optional Protocol because the disputes arose from the interpretation or application of the VCCR. *See* Optional Protocol, *supra* note 10, art. I.

[37] GENTIAN ZYBERI, THE HUMANITARIAN FACE OF THE INTERNATIONAL COURT OF JUSTICE 17 (2008); Mark L. Movsesian, *International Commercial Arbitration and International Courts*, 18 DUKE J. COMP. & INT'L L. 423, 438 (2008); Tiefenbrun, *supra* note 34, at 6.

[38] *Medellín*, 128 S. Ct. at 1358.

[39] *Id.* at 1363.

most of the cases heard by the court deal with the rights and duties of nations with respect to each other, and usually these rights and duties do not trickle down to a municipality or local governing body.[40] Up until *Avena*,[41] the enforceability of decisions from the international court at the domestic level in the United States—or in any other nation—had not been raised as an issue. The United Nations Charter, where the ICJ Statute was incorporated, obliges parties to comply with a decision by the ICJ but is silent on the question of domestic-level enforceability.[42]

Of the four cases before the ICJ that dealt with VCCR Article 36 violations by receiving states, the United States was the defendant in three of them.[43] This Note will now examine these cases.

C. *Cases in the United States Before* Medellín

1. Breard

Despite strong American support at the inception of the VCCR and the Optional Protocol, American attitude towards the two treaties changed as a series of cases with conflicting results developed. One of the first notable denials of habeas relief by the United States Supreme Court was a per curiam decision, *Breard v. Greene*.[44] In 1992, police in Arlington County, Virginia found the body of Ruth Dickie in her apartment; Angel Francisco Breard, a citizen of Paraguay, was subsequently convicted of attempted rape and murder, and sentenced to death.[45]

After appeals of his sentence and conviction were exhausted, Breard filed a habeas petition, claiming for the first time that authorities had never informed him of his right to contact the Paraguayan consulate, violating his rights under the VCCR.[46] Had he been able to communicate with the consulate, it was argued, Breard may not have rejected a plea bargain giving

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[40] *See, e.g.*, Movsesian, *supra* note 37, at 438.

[41] *See infra* Part III.C.3.

[42] U.N. Charter art. 94, para. 1.

[43] LEE & QUIGLEY, *supra* note 12, at 161. The fourth case is between Guinea and the Democratic Republic of Congo. *Id.*

[44] Breard v. Greene, 523 U.S. 371, 378–79 (1998).

[45] Breard v. Pruett, 134 F.3d 615, 617 (4th Cir. 1998). Breard was actually a citizen of both Paraguay and Argentina. *Id.* Although the Embassy of Argentina lent public support to Breard, only Paraguay sought to intervene on his behalf before the courts. *Breard*, 523 U.S. at 374; David Stout, *Do as We Say, Not as We Do; U.S. Executions Draw Scorn from Abroad*, N.Y. TIMES, Apr. 26, 1998, at WK4.

[46] *Breard*, 523 U.S. at 373.

him a life sentence instead of the death penalty; he may have refrained from testifying before the jury about being under an evil spell when he killed Dickie.[47]

While Breard was filing his habeas petition, separately, Paraguay sought relief in two venues on his behalf. Paraguay filed one suit in federal district court, claiming Paraguay's rights under the VCCR to be notified of Breard's arrest were violated by Virginian officials.[48] The district court and the Fourth Circuit both dismissed Paraguay's suit on grounds that, without Virginia giving consent, the suit could not continue due to the Eleventh Amendment's protection of states from suits by foreign states.[49] Although exceptions to protection by the Eleventh Amendment would have allowed such suits under *Ex parte Young*,[50] both courts found that Paraguay's claims did not constitute a "continuing violation of federal law" and therefore failed the *Young* test.[51] Paraguay appealed to the Supreme Court.[52]

Paraguay was also litigating a second suit, this time before the ICJ against the United States, alleging that Breard, facing execution, was denied his right to consular access under Article 36.[53] The ICJ ordered the United States to stay Breard's execution while the case was pending in the international court.[54] But before the ICJ could address the merits of the case, the United States Supreme Court denied Breard and Paraguay's writs of certiorari and applications to stay Breard's execution.[55] The Supreme Court found that Breard should have raised the VCCR violation claim in state court before filing his motion for habeas relief—that his claim was considered procedurally defaulted.[56] Invoking the "last in time rule," the Court found

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[47] Stout, *supra* note 45, at WK4.

[48] *Breard*, 523 U.S. at 374.

[49] *Id.*

[50] 209 U.S. 123, 168 (1908).

[51] *Breard*, 523 U.S. at 374.

[52] *Id.*

[53] *Id.*

[54] *Id.* Paraguay withdrew the case from the ICJ after receiving a formal apology from the United States. ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY 55 (2007).

[55] *Breard*, 523 U.S. at 378–79. Paraguay withdrew the case before the ICJ before a final judgment was issued. LEE & QUIGLEY, *supra* note 12, at 161.

[56] *Breard*, 523 U.S. at 374–78. In its memorial to the ICJ in *Avena*, Mexico defined "procedural default" as when "a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on

that the VCCR signed in 1969 was now subject to a law passed by Congress, the Antiterrorism and Effective Death Penalty Act of 1996, which provides that a habeas petitioner must show a factual basis in state court before he may be entitled to an evidentiary hearing.[57] The Court also affirmed lower decisions ruling that Paraguay could not sue Virginia under the Eleventh Amendment and declined to interfere with the execution, leaving it up to the Governor of Virginia to decide whether to stay the execution or not.[58] He didn't, and that same evening, Virginia put Breard to death by lethal injection.[59]

2. LaGrand

The United States Supreme Court again declined to enforce an ICJ order, allowing the execution of a foreign national who was not informed of his consular rights by a state government. The LaGrand brothers had been living in Arizona since their mother brought them to the United States as young children; they were eventually adopted by their mother's American husband.[60] They acted like Americans and spoke like Americans; they may have even believed they were Americans.[61] In reality, the LaGrand brothers were German nationals and had never acquired American citizenship.[62] When they botched a bank robbery attempt in 1982, resulting in the bank manager's murder,[63] there appeared to be little indication at the time of their arrest that they were not Americans; in fact, Walter LaGrand claimed he was

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appeal or in a petition for a writ of *habeas corpus*." *Avena*, 2004 I.C.J. at 56. The United States did not dispute this definition. *Id.*

[57] *Breard*, 523 U.S. at 376.

[58] *Id.* at 377–78. Paraguay again tried to argue that under *Young*, the suit should continue because this was a continuing violation of federal rights, which would allow Paraguay's claims against Virginia to continue. *Id.* at 377. The Court rejected this, finding that "[t]he failure to notify the Paraguayan Consul occurred a long time ago and has no continuing effect." *Id.* at 378.

[59] David Stout, *Clemency Denied, Paraguayan Is Executed*, N.Y. TIMES, Apr. 15, 1998, at A18.

[60] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 475 (June 27); Mark Shaffer, *Germany Fights to Save Two in Florence; Brothers Face Death in Murder of Banker*, THE ARIZ. REPUBLIC, Feb. 18, 1999, at A1.

[61] *LaGrand*, 2001 I.C.J. at 475–76.

[62] *Id.*

[63] Shaffer, *supra* note 60, at A10.

American.[64] The brothers were convicted and sentenced to death in Arizona.[65]

Germany actively responded when it realized two of its citizens were facing execution. Top German officials appealed to President Bill Clinton, Attorney General Janet Reno, Secretary of State Madeleine Albright, and Arizona Governor Jane Hull for clemency.[66] When Karl was executed, it brought German condemnation.[67] In a last-minute maneuver to prevent Walter's execution, Germany filed suit with the ICJ, claiming that by failing to inform the LaGrand brothers of their consular rights, and by executing Karl, the United States had violated the VCCR.[68] The international court ordered the United States to stay the execution pending its final decision.

The same day of the ICJ's decision, March 3, 1999, Germany motioned the United States Supreme Court for leave to file a bill of complaint and sought a preliminary injunction to prevent Walter's execution, claiming the Court had original jurisdiction in the matter.[69] Germany hoped to convince American authorities to delay Walter's execution long enough for at least the ICJ to decide the case on the merits.[70] But again, the Supreme Court refused to honor the ICJ order and interfere with Arizona's execution.[71] As with Paraguay in *Breard*, the Court said Germany did not have a right under the VCCR to assert claims against American states seeking to execute its national.[72] Governor Hull ignored multiple calls to grant clemency, and Walter was executed that day.[73]

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[64] *LaGrand*, 2001 I.C.J. at 476. Germany and the United States disagreed over the timing of when the local authorities became aware that the LaGrand brothers were not American, but German. *Id.*

[65] *LaGrand*, 2001 I.C.J. at 475; Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. TIMES, Mar. 5, 1999, at A14.

[66] Shaffer, *supra* note 60, at A1.

[67] *See, e.g.*, Cohen, *supra* note 65, at A14.

[68] Marlise Simons, *World Court Finds U.S. Violated Consular Rights of 2 Germans*, N.Y. TIMES, June 28, 2001, at A10; *LaGrand*, 2001 I.C.J. at 472.

[69] The Federal Republic of Germany v. United States, 526 U.S. 111, 111 (1999).

[70] *See LaGrand*, 2001 I.C.J. at 483 ("Germany asserts that the Court's Order of 3 March 1999 was intended to 'enforce' the rights enjoyed by Germany under the Vienna Convention and 'preserve those rights pending its decision on the merits'").

[71] *Germany*, 526 U.S. at 112.

[72] *Id.*

[73] Patty Machelor, *LaGrand: 18 Minutes to Die*, TUCSON CITIZEN, Mar. 4, 1999, at C1. Both brothers had initially chosen the gas chamber as their means of execution, in hopes that the method would be found unconstitutional. *Id.*; Cohen, *supra* note 65, at A14. The Court of Appeals for the Ninth Circuit had stayed Karl's execution, but the

The ICJ did not release an opinion on the merits of the LaGrand case until June 27, 2001, more than two years after Walter LaGrand had been executed. The United States acknowledged in arguments that there had been a breach of the obligation to Germany to inform the LaGrand brothers of their consular rights, and had apologized to Germany and promised to "tak[e] substantial measures aimed at preventing any recurrence," but beyond that, the United States asked the ICJ to dismiss the rest of Germany's claims and arguments.[74] The VCCR, the United States argued, does *not* create rights for individuals to be able to contact their consulate, but instead creates rights for the *nations* from which individuals may derive a benefit; the ICJ rejected these claims, finding indeed that Article 36 of the VCCR does create rights for individuals which may be invoked by the detained person's country.[75] The ICJ also faulted the United States for not observing the provisional order to stay Walter's execution; although the Court conceded that there was very little time between the issuance of the order and Walter's scheduled execution for the United States to act, the ICJ found the United States failed to take "all measures at its disposal" by not doing more than transmitting the ICJ's order "without any comment, particularly without even so much as a plea for a temporary stay and an explanation."[76]

Despite the breach, the punishment imposed by the ICJ was not particularly onerous for the United States. Germany had not requested monetary damages as reparation, so the ICJ did not order payment from the United States.[77] The only substantive binding orders the ICJ imposed on the United States were for the United States to ensure future compliance with the

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Supreme Court lifted the stay without comment, prompting Karl to switch to lethal injection, and he was executed on February 24th. Machelor, *supra* note 73, at C1; Cohen, *supra* note 65, at A14. Walter did not change his mind; the use of the gas chamber for his execution was appalling to the German public, as Germany had abolished the death penalty largely because of the gas chamber's association with the Holocaust. *German Anger Rises over U.S. Executions*, THE DAILY OKLAHOMAN, Mar. 8, 1999, at 4.

[74] *LaGrand*, 2001 I.C.J. at 474. Among other things, the issue of procedural default again was raised by the United States. Because "failure of counsel is imputable to their clients," it was not Arizona's fault or failure of duty that notice of the breach was not raised earlier by the LaGrand brothers, and since the claim was not raised in good enough time, the claim was procedurally barred in domestic court *and* "inadmissible in international tribunals for failure to exhaust local remedies." *Id.* at 487–88. The Court, however, readily rejected this argument, noting that "it was the United States itself which had failed to carry ou[t] its obligation under the Convention to inform the LaGrand brothers." *Id.* at 488.

[75] *Id.* at 493–94.

[76] *Id.* at 507.

[77] *Id.* at 516.

VCCR and, should German nationals be denied consular access if arrested in the United States in the future, for the United States to provide "review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth" in the VCCR.[78]

Back when the VCCR was first being drafted, the United States was such an ardent proponent of the VCCR that it probably never would have made the argument that the right to contact one's consulate did not belong to the individual.[79] Such an argument does not further the United States' original intent in getting the VCCR established in the first place. Somewhere between the inception of the VCCR and *Bread* and *LaGrand*, the interests of the United States government shifted from an expansive, global outlook (ensuring protective measures for American citizens in foreign nations) to a more insular, nationalistic agenda (affirming the death sentences of foreign nationals convicted of violent crimes within the United States).

3. Avena

The biggest clash between the ICJ and the United States Supreme Court was precipitated by the ICJ decision that would directly affect *Medellín*. This time, it was Mexico claiming the United States was in violation of Article 36 of the VCCR in *Case Concerning Avena and Other Mexican Nationals*; Mexico brought its claims to the ICJ through the Optional Protocol.[80] Mexico alleged that fifty-two Mexican nationals on death row in the United States were not informed of their VCCR right to consular access after being arrested by local authorities.[81] In twenty-nine of the cases, the Mexican consulates learned of the defendants' arrests only after they had been sentenced to death, and in twenty-three of the cases, the consulates learned through means other than notification by local law enforcement.[82]

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[78] *LaGrand*, 2001 I.C.J. at 516.

[79] *See supra* Part II.A.

[80] *Avena*, 2004 I.C.J. at 39.

[81] *Id.* Originally, Mexico brought fifty-four cases but some were later withdrawn. *Id.* at 25–26. In fifty of the cases, the defendants were never informed by the local law enforcement of their VCCR consular rights. *Id.* at 26. Mexico claimed that one Mexican defendant was not informed of his consular rights for forty hours after arrest; another, eighteen months after arrest; and a third defendant, four years after his arrest, upon his arrival on death row. *Id.* at 42.

[82] *Id.* at 26.

There were several issues the ICJ had to address.[83] The United States had argued, partly as a defense against admissibility of Mexico's claims, that some of the Mexican defendants in *Avena* were also actually United States citizens—that they, in fact, held dual citizenship.[84] Under Article 36 of the VCCR, the United States claimed, Mexico had no right to exercise diplomatic protection over dual Mexican-American citizens who were not informed of consular rights.[85] Instead of addressing the issue of whether dual citizens arrested in one country of their citizenship may still contact a consulate of the other nation of citizenship under Article 36, the court posed the issue as a question of timing: under paragraph 1 of Article 36—which would require local law enforcement agencies in the United States to inform the appropriate Mexican consulate "without delay"—when would such a duty rise: upon arrest of the individual, or "upon ascertainment of nationality"?[86] The ICJ acknowledged the United States' claim that it was a multicultural society with millions of non-Americans and many American citizens who speak different languages, the implication being that it would be difficult to ascertain which arrested individuals were American citizens and which were not.[87] But the ICJ found that to be all the more reason for the

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[83] Notable issues the ICJ mentioned but did not decide included whether the convictions and sentences of the defendants were correct, and whether access to consular assistance would have substantially affected the criminal proceedings or the outcomes. That was for the courts in the United States to decide. *See Avena*, 2004 I.C.J. at 60.

[84] *Id.* at 36.

[85] *Id.*

[86] *Id.* at 40. The ICJ found that because the United States was the party seeking to establish that some *Avena* defendants held both Mexican and American citizenship, it had the burden of proving this, and that the United States failed to carry this burden of proof before the court. *Id.* at 41–42. Thus, the court did not accept the United States' claims that the *Avena* defendants held dual citizenship. *Id.* at 42.

As of 2008, the issue of consular rights of dual citizens under Article 36 appears still to be unresolved. In preparation for the 2008 Beijing Olympics, the United States Embassy prepared an information sheet for Americans coming to China to watch the games. Fact Sheet, U.S. Department of State, Bureau of Consular Affairs: Olympics 2008, http://beijing.usembassy-china.org.cn/032508olympics.html (last accessed Mar. 13, 2009). Individuals holding dual citizenship—in particular, dual Chinese-American citizens—were warned that "entering China using their non-U.S. passport could mean that the Chinese Government may not afford them the consular protections [from United States consular officers] to which they are entitled." *Id.* The U.S. government would still offer consular assistance to Americans regardless of whether they held dual nationality, but the embassy warned that "use of other than a U.S. passport to enter China can make it difficult for U.S. Consuls to assist dual national Americans who have been arrested or who have other concerns with the Chinese Government." *Id.*

[87] *Avena*, 2004 I.C.J. at 44.

United States to routinely inquire into an arrested individual's citizenship.[88] Understanding that in some situations it is reasonable that an individual's nationality is not immediately apparent, and that the facts of each case will vary, the ICJ found that the duty to inform the foreign national's consulate "without delay" arises "once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."[89]

"Without delay" of course was subject to the different interpretations by Mexico and the United States. Mexico pushed for an interpretation reflecting "unqualified immediacy," given how critical exercising Article 36 rights quickly is, but the United States argued for an interpretation suggesting not immediacy but "'as soon as reasonably possible under the circumstances.'"[90] The normal expectation of "as soon as reasonably possible under the circumstances" was, according to the United States, twenty-four to seventy-two hours after arrest or detention.[91] The ICJ simply reiterated the above rule:

> Although . . . "without delay" . . . is not to be understood as necessarily meaning "immediately upon arrest," there is nonetheless a duty upon the arresting authorities to [inform] an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.[92]

Given the factual circumstances of most of the cases being adjudicated, the ICJ found the United States to have violated the "without delay" provision of Article 36(1)(b).[93]

Mexico sought several remedies from the ICJ. It asked that the United States cease violations of Article 36, which the ICJ felt was satisfied by the United States' assurances and good faith efforts to comply with the treaty,[94] even though the United States had previously made such assurances to Germany in *LaGrand*.[95] Mexico also requested that the United States annul

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[88] *Id.* ("[P]articularly in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquiry routinely to be made of the individual as to his nationality upon his detention.")

[89] *Id.* at 43.

[90] *Id.* at 47.

[91] *Id.*

[92] *Id.* at 49.

[93] *Avena*, 2004 I.C.J. at 46.

[94] *Id.* at 62, 69.

[95] *LaGrand*, 2001 I.C.J. at 511; *see also supra* Part II.C.2.

the defendants' convictions and sentences and that evidence obtained in violation of Article 36 be excluded from the defendants' future criminal proceedings; the ICJ rejected such remedies.[96] Instead, the ICJ found the appropriate remedy was to have the United States "provide, by means of its own choosing, review and reconsideration of the convictions and sentences" of these Mexicans on death row[97]—similar to the remedy in *LaGrand*.[98]

4. *Compliance with* Avena *by Some States*

These cases share common events: a foreign defendant is not informed of his VCCR rights and is sentenced to death; by the time his consulate is able to intervene, the local courts have already held a VCCR violation claim time-barred. From the perspective of Paraguay, Germany, and Mexico, it is unfair to take such extreme punishment against their disadvantaged nationals, and not allow them to claim rights they should have been granted in the first place. Lack of consular notification was a due process issue, but otherwise they received fair and impartial trials, as is the right of defendants in the United States to receive such trials. Their desperation in appealing was to save their lives; had they not been placed on death row, it is likely they would not have claimed their consular rights were violated, as indicated by Mexico withdrawing the Illinois defendants from their *Avena* suit after their sentences were commuted to life in prison.

Reaction to *Avena* in the United States was mixed: some local courts and officials complied, some rejected the decision.[99] Arkansas gave up its effort to execute a Mexican national after *Avena*.[100] In Oklahoma, courts complied with the ICJ's order and reviewed the case of one Mexican mentioned in

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[96] *Avena*, 2004 I.C.J. at 58–61.

[97] *Id.* at 72.

[98] *Id.* at 59; *see also supra* Part II.C.3.

[99] The cases of the Mexican nationals of *Avena* took place in nine different states between 1979 and the release of the decision: Arizona, Arkansas, California, Illinois, Nevada, Ohio, Oklahoma, Oregon, and Texas. California and Texas had the largest number of Mexican *Avena* defendants, twenty-eight and fifteen cases respectively; Illinois had three, and the rest had one each. *Avena*, 2004 I.C.J. at 24.

Two days after Mexico filed this case with the ICJ, Illinois Governor George Ryan commuted the death sentences of all death row inmates in the state to life without parole. *Id.* at 27; *see also* Maurice Possley & Steve Mills, *Clemency For All: Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB. Jan. 12, 2003, at C1. Mexico subsequently withdrew the Illinois Mexican defendants' names from the case. *Avena*, 2004 I.C.J. at 27.

[100] Kenneth Williams, *Does the ICJ's Decision in* Avena *Mean Anything to Mexicans on Death Row?*, 55 CATH. U. L. REV. 351, 362 (2006).

Avena, Osbaldo Torres.[101] The Oklahoma Court of Criminal Appeals upheld evidentiary findings by the trial court that found that because he was not informed of his VCCR consular rights, Torres had been prejudiced.[102] The appeals court adopted a three-prong test used in other jurisdictions to determine if violation of a foreign defendant's VCCR rights had prejudiced his case: whether the defendant did not know about the right to consular access, whether he would have availed himself of the right if he had known, and whether the consulate would likely have assisted the defendant.[103] At the same time, Oklahoma Governor Brad Henry was mindful of the *Avena*

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[101] Torres v. State, 120 P.3d 1184 (Okla. Crim. App. 2005). Even before *Avena*, the Oklahoma Court of Criminal Appeals set aside the death sentence of another Mexican national, Geraldo Valdez. Valdez v. State, 46 P.3d 703, 711 (Okla. Crim. App. 2002). Upon learning that Valdez would be executed, the Mexican consulate and Mexican government provided attorneys and investigators who discovered mitigating evidence and obtained executive reprieves and a stay of the execution. Gregory J. Kuykendall, Alicia Amezcua-Rodriguez & Mark Warren, *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989, 996 (2008). The court rejected the merits of Valdez's arguments and applied *Breard* over *LaGrand*, finding that Valdez had procedurally defaulted on his VCCR claim by not raising it on his first appeal. *Valdez*, 46 P.3d at 709. Even so, the court remanded the case for re-sentencing, finding that Valdez's trial counsel's "inexperience and ineffectiveness" was the reason for the mitigating evidence not being discovered until the Mexican consulate sent assistance. *Id.* at 710.

[102] *Torres*, 120 P.3d at 1185–86.

[103] *Id.* at 1186–87. The test to determine if violation of VCCR consular rights had prejudiced the defendant's interests was first formulated in United States v. Rangel-Gonzales, 617 F.2d 529, 533 (9th Cir. 1980). This test was utilized in several other cases before *Torres*. *See also* United States v. Proa-Tovar, 975 F.2d 592, 594 (9th Cir. 1992); United States v. Villa-Fabela, 882 F.2d 434, 440 (9th Cir. 1989) (overruled on other grounds); United States v. Chaparro-Alcantara, 37 F. Supp. 2d 1122, 1126 (C.D. Ill. 1999); United States v. Esparza-Ponce, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998); People v. Preciado-Flores, 66 P.3d 155, 161 (Colo. App. 2002); Zavala v. State, 739 N.E.2d 135, 142 (Ind. Ct. App. 2000); State v. Lopez, 633 N.W.2d 774, 783 (Iowa 2001); State v. Cevallos-Bermeo, 754 A.2d 1224, 1227 (N.J. Super. Ct. App. Div. 2000). Since the events of *Medellín*, this test is no longer used. Moreno-Gonzalez v. United States, 2008 U.S. Dist. LEXIS 31172 at *24 (M.D. Fla. 2008).

Interestingly, the ICJ in its *LaGrand* decision did not seem to consider these factors affecting prejudice as necessary for remedying a VCCR violation:

> It is immaterial for the purposes of the [*LaGrand*] case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. *It is sufficient that the Convention conferred these rights*, and that Germany and the LaGrands *were in effect prevented* by the breach of the United States *from exercising them*, had they so chosen.

LaGrand, 2001 I.C.J. at 492 (emphasis added).

decision when he commuted Torres's death sentence to life without parole.[104] Both the appeals court and Governor Henry made reference to the concern over American citizens' safety abroad under the VCCR in their decisions.[105] In fact, Governor Henry had been contacted by the Department of State.[106]

In March 2005, President George W. Bush had the Justice Department send a memorandum to state Attorneys General pressing for compliance with *Avena* at the state level.[107] At the same time, President Bush sent notice that the United States was withdrawing from the jurisdiction of the ICJ with regard to disputes arising from the VCCR.[108]

Not all jurisdictions in the United States agreed with the *Avena* decision. The strongest opposition came from Texas regarding the case of death row inmate José Ernesto Medellín.

D. Medellín v. Texas: *Procedural Background*

The events leading to *Medellín* started five years before *Breard* was decided. In 1993, two teenage girls were raped and murdered by members of the "Black and Whites" gang; Medellín, a Mexican national who had lived in the United States since preschool, was arrested for his involvement in the crime, being responsible for strangling at least one of the girls himself.[109]

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[104] John Greiner, *Henry Commutes Death Sentence*, THE OKLAHOMAN, May 14, 2004, at 1A. Because the governor commuted Torres' death sentence, the appeals court did not determine what the appropriate remedy would have been for the violation of Torres' VCCR rights. *Torres*, 120 P.3d at 1190. The question of whether Mexico's assistance to Torres would have resulted in a sentence less than the death penalty was rendered moot. *Id.*

[105] *See Torres*, 120 P.3d at 1187 ("The essence of a Vienna Convention claim is that a foreign citizen, haled before an unfamiliar jurisdiction and accused of a crime, is entitled to seek the assistance of his government . . . . This protection extends to every signatory of the Convention, including American citizens"); Greiner, *supra* note 104, at 1A (quoting Governor Henry: "The treaty is also important in protecting the rights of American citizens abroad").

[106] Greiner, *supra* note 104, at 1A.

[107] Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18/html; *see also* Linda Greenhouse, *Bush Decision to Comply with World Court Complicates Case of Mexican on Death Row*, N.Y. TIMES, Mar. 29, 2005, at A14.

[108] Brief for the United States as Amicus Curiae Supporting Petitioner at 5, Medellín v. Texas, 128 S. Ct. 1346 (2008) (No. 06-984).

[109] *Medellín*, 128 S. Ct. at 1354.

Police officers informed him of his *Miranda* rights to remain silent and have an attorney; he waived these rights, submitted a proper written waiver form, and wrote out a detailed confession of the crime for the police.[110] But he was not told that he had a right to contact the Mexican consulate.[111] He was convicted, and sentenced to death, both of which were affirmed on appeal.[112]

It was after this appeal that Medellín first raised his claim under Article 36 of the VCCR.[113] He applied for state post-conviction relief, but the trial court rejected his claim on the grounds that his VCCR claim was procedurally defaulted since the claim was not raised at trial or on appeal, and that there was no showing that the validity of his conviction or sentence was affected by the nondisclosure of his VCCR rights.[114] The Texas Court of Criminal Appeals affirmed, prompting him to file a habeas petition in federal district court, which also denied relief for the same reasons as the Texas trial court.[115]

Medellín appealed this to the Court of Appeals for the Fifth Circuit.[116] While this was pending before the Fifth Circuit, the *Avena* decision was released; Medellín was one of the Mexican nationals included in *Avena*.[117] The Fifth Circuit then rejected Medellín's appeal, citing to *Breard*'s rule that VCCR claims not raised at trial or appeal are procedurally defaulted when raised in a habeas petition.[118]

The United States Supreme Court granted certiorari, but before oral arguments were presented, President Bush issued his memorandum pressing for state courts to comply with *Avena* and announcing the United States' withdrawal from the Optional Protocol.[119] The ICJ decision in *Avena* and the directive from President Bush prompted Medellín to re-file another habeas petition back in state court while he still had his previous case pending before the Supreme Court.[120] This left the Supreme Court conflicted as to what to do; the Court dismissed Medellín's petition for certiorari to give the Texas

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110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at 1354–55.

115 *Medellín*, 128 S. Ct. at 1355.

116 *Id.*

117 *Id.*; see the discussion on *Avena*, *supra* Part II.C.3.

118 *Medellín*, 128 S. Ct. at 1355.

119 *Id.*

120 *Id.* at 1356.

courts a chance to sort out the case and address the issue of review and reconsideration under *Avena*.[121]

Back at the Texas Court of Criminal Appeals, the directive from President Bush and the *Avena* decision by the ICJ were rejected, and Medellín's second habeas application denied.[122] Neither *Avena* nor the President's memorandum were considered binding federal law that preempted Texas criminal law governing the conditions under which a habeas petition may be considered on the merits.[123] The appeals court adopted the proposition that ICJ decisions are not binding, but are instead entitled to "respectful consideration,"[124] while the President exceeded his inherent authority under the Constitution in ordering the states to comply with *Avena* without any kind of authorization from Congress.[125] Once again, Medelllín appealed, and once again, the United States Supreme Court granted certiorari.[126]

E. *The Decision of* Medellín v. Texas

In his second habeas application, the main thrust of Medellín's argument was that both *Avena* and the President's memorandum preempted state law placing limitations on successive habeas petitions; the majority addressed and rejected these two sources in turn.[127]

The majority held that *Avena* was not binding at the domestic level.[128] In order for *Avena* to have binding effect domestically in the United States, the treaties that give rise to *Avena*—the Optional Protocol, the United Nations

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[121] *Id.*; Linda Greenhouse, *Justices Drop Capital Case Ruled on by World Court*, N.Y. TIMES, May 24, 2005, at A17. The Supreme Court decision denying certiorari is reported as *Medellín v. Dretke*, 544 U.S. 660, 664 (2005) (per curiam).

[122] Ex parte Medellín, 223 S.W.3d 315, 385 (Tex. Crim. App. 2006); *Medellín*, 128 S. Ct. at 1356.

[123] *Ex parte Medellín*, 223 S.W.3d at 323.

[124] *Id.* at 331 (quoting *Breard*, 523 U.S. at 375).

[125] *Id.* at 342–43.

[126] *Medellin*, 128 S. Ct. at 1356.

[127] *Id.* at 1356–67 (discussing *Avena*), 1367–72 (addressing the Presidential Memorandum). However, this Note focuses on the Supreme Court's treatment of the ICJ and *Avena*, and focuses on the majority's discussions on presidential authority as granted by Congress only to the extent that the Presidential Memorandum attempted to enforce *Avena* in state courts.

[128] *Id.* at 1357.

Charter, or ICJ Statute—had to be binding.[129] There are two ways for an international treaty to be binding domestically. When a treaty enters into effect without any follow-up legislative provision required by Congress, the treaty is considered to be self-executing and binding; if a treaty is not self-executing, additional action by Congress in the form of legislation is required for the treaty to be enforceable domestically.[130] As there seemed to be a consensus before the Court that Congress never passed legislation executing the treaty, that left the Court to determine whether the treaty's language makes it self-executing—an inquiry it answered in the negative.[131]

The Optional Protocol could force a signatory state into the ICJ's jurisdiction, the majority said, but once the ICJ rendered a decision there was nothing in the Protocol about the force or authority the decision had.[132] Article 94 of the United Nations Charter was worded to "depend[] . . . on the interest and the honor of the governments which are parties to it," but it was *not* worded to have immediate binding effect on member states of the United Nations.[133] The fact that the sole remedy for not complying with the Charter was referral to the Security Council of the United Nations—a diplomatic solution, not a legal or judicial one—was further indication that the drafters of the Charter did not intend for it to be binding domestically.[134]

And Medellín could not rely on the ICJ statute, as ICJ decisions were binding only upon the parties of the particular case—and the ICJ hears disputes between nations, not an individual and a nation.[135] Even though *Avena* had bearing directly on Medellín's case, he was still not entitled to

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[129] *Id.* The issue framed was regarding the enforceability of *Avena*, not the VCCR, so the Court did not address the question of whether the VCCR was self-executing or not. *Id.* at 1357 n.4.

[130] *Id.*

[131] *Id.*

[132] *Medellín*, 128 S. Ct. at 1358.

[133] *Id.* at 1358–59. (citing Edye v. Robertson (*Head Money Cases*), 112 U.S. 580, 598 (1909)). Article 94(1) states: "Each Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." U.N. Charter art. 94, para. 1.

[134] *Medellín*, 128 S. Ct. at 1359. Article 94(2) states: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [ICJ], the other party may have recourse to the Security Council, which may . . . make recommendations or decide upon measures to be taken to give effect to the judgment." U.N. Charter art. 94, para. 2.

[135] *Medellín*, 128 S. Ct. at 1360. Article 34(1) of the ICJ statute states: "Only states may be parties in cases before the Court." ICJ Statute, art. 34(1).

have his dispute heard before the ICJ.[136] The majority put the onus on Medellín to provide evidence of other signatory nations to the ICJ's statute holding ICJ judgments as binding in their domestic courts.[137] Assuming no other nation did so, the majority inferred from this that no other nation would give ICJ decisions binding effect domestically.[138] This "postratification understanding" of other signatory nations, the majority claimed, "confirmed" that ICJ decisions were not self-executing and binding on domestic courts in other nations.[139]

The three-member dissent was written by Justice Breyer. Noting the myriad ways different nations incorporate international treaties into their domestic law, Justice Breyer strongly criticized the majority for finding the treaties not self-executing:

> True, neither the Protocol nor the Charter explicitly states that the obligation to comply with an ICJ judgment automatically binds a party *as a matter of domestic law* without further domestic legislation. *But how could the language of those documents do otherwise?* The treaties are multilateral. . . . [S]ome signatories follow British further-legislation-always-needed principles, others follow United States Supremacy Clause principles, and still others . . . can directly incorporate treaty provisions into their domestic law in particular circumstances. Why, given national differences, would drafters, seeking as strong a legal obligation as is practically attainable, use treaty language that *requires* all signatories to adopt uniform domestic-law treatment in this respect?[140]

The dissent also pointed out the obvious indicia that the treaty was meant to be binding: the language of the treaty *and* the full title of the Optional Protocol (the Optional Protocol Concerning the *Compulsory* Settlement of Disputes), and that the Department of State as much declared the treaties to be binding when Congress ratified the VCCR.[141] The dissent was also aware of how the majority's decision would reflect badly on the United States globally because of "our failure to follow the 'rule of law' principles that we preach."[142]

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[136] *Medellín*, 128 S. Ct. at 1360–61.

[137] *Id.* at 1363.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 1383 (emphasis in original) (citations omitted).

[141] *Id.* at 1383, 1386. Technically, the President, with the advice and consent of the Senate, ratifies treaties such as the VCCR. U.S. CONST. art. II, § 2, cl. 2.

[142] *Medellín*, 128 S. Ct. at 1391.

With his appeals exhausted, Jose Medellín was finally executed in August 2008.[143]

III. THE AMERICAN PRESENCE ABROAD

A. *American Expatriates*

Multiple commentators and jurists have expressed the concern that the holding of *Medellín* puts the American abroad at risk: Because the United States has withdrawn from the Optional Protocol and the jurisdiction of the ICJ, and because it now has a history of not remedying Article 36 violations when arresting foreign nationals, other nations will have no reason to accord American citizens arrested within their territories the same rights denied by the United States.[144] Perhaps most Americans do not travel abroad (and thus will never need to contact a consulate), and that many of the Americans who do travel never run into trouble with local authorities abroad. But this marginalization of the issue is not consistent with the realities of the increase in globalization. Greater internationalization, not isolation, is the trend, and the migration of individuals from one nation to another has grown. This is true for Americans, as more venture outside the United States for vacations, temporary relocation, or more permanent residency.

Trying to estimate the numbers of American citizens abroad, however, has proven to be difficult—if not impossible—as estimates vary widely. Different studies from different years have yielded estimations that vary, making it difficult not only to determine how many Americans live or travel abroad, but also how those numbers are changing; the United States government cannot say for sure how many Americans are abroad. In 1999, the Department of State estimated that four million Americans were residing outside the United States, but since the release of that estimate, there have been no new official government studies,[145] and the Census Bureau does not keep track of how many Americans live abroad.[146] Private estimations by

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[143] Allan Turner & Rosanna Ruiz, *Medellín Put to Death After One Last Appeal*, HOUSTON CHRON., Aug. 6, 2008, at A1.

[144] For some examples of recent high-profile cases involving Americans arrested abroad, see *supra* note 6.

[145] JOHN R. WENNERSTEN, LEAVING AMERICA: THE NEW EXPATRIATE GENERATION 2 (2008); Jay Tolson, *The Quiet Exodus*, U.S. NEWS & WORLD REP., Aug. 4, 2008, at 33.

[146] Tolson, *supra* note 145, at 33. The chief of immigration statistics at the U.S. Census Bureau, Elizabeth Grieco, was quoted as saying, "We don't count U.S. citizens living abroad." *Id.* However, the U.S. Census Bureau does count American federal employees stationed abroad, including military servicemen. *See, e.g.*, Julie Cart, *Utah*

one organization put the number of Americans currently abroad at closer to six million, a number that will grow by 3.3 million by 2015 as more high-tech and white-collar American workers will migrate abroad.[147] Six million was also the estimate of a 1994 study that did not count military servicemen and federal government employees stationed overseas,[148] while yet another study conducted more recently puts the number of non-federal employee, non-military Americans abroad anywhere between four and seven million.[149] It is estimated that Canada, Mexico, Germany, the Philippines, and the United Kingdom have American expatriate populations greater than 200,000 each.[150]

Counting the number of Americans living abroad is uncertain enough, but counting the number of Americans arrested overseas may be even more obscure. In 2007 the Department of State released figures, compiled from reports from foreign governments and family members of arrestees, showing how many Americans were arrested in cities worldwide.[151] In the top ten cities where Americans were arrested and taken into custody that year, 2,353 people were arrested.[152] In a survey of 290 cities worldwide where Americans were arrested, 4,473 arrests took place in 2003, 3,614 in 2005, and 4,456 in 2006.[153] But because the Department of State compiled these numbers from other governments and family reports, Department of State officials warn that the numbers may not be comprehensive.[154] Additionally, the figures reflected the number of arrests reported according to cities, not nationally.

Sues Census to Prove That Missionaries Abroad Count Too, L.A. TIMES, Mar. 8, 2001, at A5. This became a point of contention between Utah and North Carolina after the 2000 census: 11,000 Mormon missionaries and 3,500 military and federal employees abroad that year hailed from Utah, while North Carolina counted 107 missionaries and 18,000 military and federal employees abroad. But the Census counted only the military and federal employees, giving North Carolina an edge over Utah for another congressional seat—by only 856 people. *Id.*

147 WENNERSTEN, *supra* note 145, at 2.

148 *Id.* at 4.

149 Tolson, *supra* note 145, at 33.

150 WENNERSTEN, *supra* note 145, at 4.

151 Christopher Reynolds, *A Rare Snapshot of Trips Gone Wrong*, L.A. TIMES, Oct. 28, 2007, at L8.

152 *Id.*

153 *Id.*

154 *Id.*

Table 2: Top Ten Cities Where Americans Were Arrested and the Number of Americans Taken Into Custody in 2007.[155]

Tijuana, Mexico	5 20
Guadalajara, Mexico	4 16
Nuevo Laredo, Mexico	3 59
London, United Kingdom	2 74
Mexico City, Mexico	2 08
Toronto, Canada	1 83
Nassau, Bahamas	1 08
Merida, Mexico	9 9
Nogales, Mexico	9 6
Hong Kong, China	9 0

Of the crimes that Americans abroad are accused of committing, drug-related crimes seem to be the most common, and the number of incidents appears to be rising.[156] The Department of State once estimated that 2,000 to 3,000 Americans are arrested *every year* and charged with drug crimes in more than one hundred countries, often for possession of small amounts of marijuana.[157] While it is possible that many of the Americans arrested are actively and intentionally involved in criminal activities abroad, it is more likely that most of those arrested are innocent, ignorant, have been falsely accused, the victim of a misunderstanding, or simply stupid. The rise in drug arrests abroad is an example of such circumstances; for example, possession of fifty grams of marijuana is a misdemeanor in the states of Hawaii[158] and

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[155] *Id.* This survey did not include any cities in Iraq—American military contractors have been shielded from local authorities there since 2004. *Id.*

[156] Barbara Crossette, *Tough Times in Foreign Jails*, N.Y. TIMES, June 14, 1992, § 4, at 3.

[157] *Id.*

[158] HAW. REV. STAT. §§ 712-1248(1)(c), (2) (2008).

Michigan, where it is punishable by no more than a year of prison.[159] But possession of the same amount could bring up to eight years' imprisonment in Indonesia[160]—or possibly death elsewhere.[161]

An American arrested in a foreign land may be unable to communicate with local police or the guards, might not understand local customs or the criminal system, and may not even know why he was arrested. Or he may not understand what constitutes a crime in a foreign country, or how severe the punishment could be for seemingly innocuous behavior; if questioned by the police, he may acknowledge a fact that, unbeknownst to him, ends up being an admission of guilt to a crime.[162]

American officials should be concerned: the Department of State's reliance on other governments for information on the number of Americans in custody is indicative of the problem created by *Medellín*. Article 36(1)(b) of the VCCR imposes the duty on officials of the receiving state to inform the consular office of a national's arrest.[163] The source of conflict in *Breard*, *LaGrand*, and *Avena* (which lead to *Medellín*), of course, was that the officials of the United States did *not* inform the consular offices of Paraguay, Germany, and Mexico, respectively, that their nationals had not only been arrested, but been placed on death row.[164] This might lead another

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[159] MICH. COMP. LAWS § 333.7403(2)(d) (2008). The misdemeanor is punishable by either imprisonment of no more than a year, *or* a fine up to $2000.

[160] *See Aussie Faces 8 Years' Jail Over Indonesian Drug Charges*, ABC PREMIUM NEWS (Australia), May 22, 2006 (Australian woman facing eight years for purchasing fifty grams and two small bags of seeds in Indonesia).

[161] *See, e.g.*, Crossette, *supra* note 156 ("In several countries the death penalty has been imposed for . . . varying degrees of possession.").

[162] *See, e.g.*, LAUFER, *supra* note 1, at 94–99 (recounting how a Texas engineer working in Saudi Arabia was charged with running an illegal pornography videotape club, because of his collection of American videos that included Disney films and American television shows, but nothing actually rated in the United States as pornographic).

[163] If the national chooses to inform the consul. VCCR, *supra* note 3, art. 36(1)(b). The fact that this duty to inform the consular office is not automatic, but contingent on the national requesting that the consular office be informed, adds even more uncertainty to the figures provided by other governments. *See Avena*, 2004 I.C.J. at 50, 52. (Defendant Juárez was informed of his consular rights forty hours after arrest, but chose not to have his consular office notified of his arrest. In his case, the United States was found not to be in violation of Article 36(1)(a) because he declined notifying the Mexican consulate, but was still found to be in violation of Article 36(1)(b) because informing Juárez himself of his consular rights forty hours after arrest when his Mexican nationality was immediately apparent was not "without delay.")

[164] The LaGrand brothers were not informed of the right to notify the German consul for sixteen years. *Avena*, 2004 I.C.J. at 52. The German consulate was not

government—such as Mexico—to harbor suspicions that the United States has more of its nationals in custody but is not disclosing that, so as to prevent consular intervention. In this situation, if the Department of State were to request information from this government regarding Americans in custody, the incentives to withhold that information would be greater than the incentives to disclose.

To an American arrested in a foreign land, who may be unable to communicate with local police or the guards, does not understand local customs or the criminal system, and may not even know why he was arrested, being able to communicate with a fellow American from the consulate becomes an important conduit to understanding the predicament and dealing with the situation.

B. *Functions and Services of the Consular Office*

American consular officers recognize their duty to assist Americans overseas as one of the most important duties of the consulates, especially when it comes to detained or arrested Americans.[165] They have certain duties or instructions whenever they are sent to visit a detained American in a foreign prison. Consular officers are authorized to do the following when an American is first detained: provide the prisoner with a list of local attorneys to contact for legal representation, inform the prisoner of how the legal system works, notify family or friends back home and serve as a means of communication between the prisoner and the outside world,[166] and protect

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informed of Karl and Walter LaGrand's arrest until ten years after it happened. Simons, *supra* note 68. With the Mexican defendants in *Avena*, the consulates were informed of each defendant's arrest at various times in the criminal proceedings, with disagreements between Mexico and the United States as to when exactly the consulate was notified in some cases. *See Avena*, 2004 I.C.J. at 51–53. For further discussions on these cases, see *supra* Part II.C–D.

In *Avena*, the ICJ found that the nondisclosures of arrests to Mexico had violated Mexico's right under Article 36(1)(a) to communicate with its nationals—but this right was framed in terms of whether the defendants were informed of their rights, and whether the defendants wanted the local authorities to tell the Mexican consulates. *Avena*, 2004 I.C.J. at 52.

[165] Instructions to consular officers have emphasized this duty: "'Our most important function as consular officers is to protect and assist U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail.'" LEE & QUIGLEY, *supra* note 12, at 147.

[166] U.S. DEPT. OF STATE, ASSISTANCE TO U.S. CITIZENS ARRESTED ABROAD, at http://travel.state.gov/travel/tips/emergencies/emergencies_1199.html (last accessed Aug. 19, 2009).

the prisoner's personal property.[167] For Americans serving prison sentences, consular officers are allowed to visit regularly and provide loans to certain destitute Americans,[168] provide for dietary supplements[169] or arrange for the prisoner to receive food (if the prison does not feed the prisoners) or supplement the prisoner's meals (if the prison's allocation of food is inadequate),[170] and arrange for independent or required medical care if needed.[171] Officers can provide certain items for the prisoner's comfort, including toiletries, reading material, stamps, and stationery.[172]

More importantly, consular officers check if a prisoner has been abused or mistreated; officers are instructed to document the condition of the prisoner in case the consulate will protest such treatment.[173] Officers make reports about the prisoner to the Department of State; if a prisoner is tried and court hearings are held, a consular officer usually attends the trial.[174] The presence of a consular officer at trial may be significant, as it signals to the detaining authorities that mistreatment of the prisoner will be noticed by officials of the sending state.[175] The consul can also protest to the appropriate authority if bias against the prisoner, based on his nationality, is detected at the trial.[176] The consulate *cannot* demand that local law enforcement immediately release the American, and it cannot actually represent the American at trial, provide the American with legal advice, or pay for his legal representation.[177]

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[167] LEE & QUIGLEY, *supra* note 12, at 148.

[168] ASSISTANCE TO U.S. CITIZENS ARRESTED ABROAD, *supra* note 166. Such loans are limited to only destitute prisoners who qualify under the Emergency Medical/Dietary Assistance program. *Id.*

[169] *Id.*

[170] LEE & QUIGLEY, *supra* note 12, at 149.

[171] *Id.*; Assistance to U.S. Citizens Arrested Abroad, *supra* note 166.

[172] LEE & QUIGLEY, *supra* note 12, at 148; Assistance to U.S. Citizens Arrested Abroad, *supra* note 166.

[173] LEE & QUIGLEY, *supra* note 12, at 148; Assistance to U.S. Citizens Arrested Abroad, *supra* note 166.

[174] LEE & QUIGLEY, *supra* note 12, at 149; Assistance to U.S. Citizens Arrested Abroad, *supra* note 166. But as noted in *supra* Part III.A, the Department of State does not keep track of the number of Americans abroad or Americans arrested abroad.

[175] LEE & QUIGLEY, *supra* note 12, at 150. The consul's presence at trial may also "assuage the distress of detained nationals." *Id.* (quoting Consular Officers and Consulates, 1975 DIGEST § 2, at 250).

[176] LEE & QUIGLEY, *supra* note 12, at 149; Assistance to U.S. Citizens Arrested Abroad, *supra* note 166.

[177] Assistance to U.S. Citizens Arrested Abroad, *supra* note 166.

IV. A SURVEY OF OTHER NATIONS WHO ARE PARTIES TO THE TREATIES

A. *Mexico*

1. *Americans in Mexico*

When it comes to consular rights, probably in no other nation do American expatriates have the greatest stake than in Mexico—the complaining state in *Avena* and the country of origin of José Medellín. Out of all foreigners in the United States, Mexicans and Central Americans make up the largest group.[178] And, as demonstrated in *Avena*, there is a large Mexican population on death row in the United States; Mexican nationals comprise the largest group of foreigners on death row.[179] Conversely, more than any other nation, Americans flock to Mexico. In addition to the American embassy in Mexico City, ten consulates are located throughout the nation—the greatest number of American consulates in any country.[180]

As with other numbers, it is difficult to get consistent estimates in determining exactly how many Americans reside in Mexico. But the estimates tend to agree on one thing: no other nation has more United States citizens than Mexico. One estimate in 2000 put the number at 124,000 Americans.[181] Another from 2005 gave a range of 600,000 to one million.[182] This estimate somewhat corresponds to one released a year later, putting the number at 1,036,300 American residents and making Mexico the number one country for American expatriates.[183]

Visitors and tourists also come in large numbers: the Mexican Tourist Department estimated that there were twenty-three million foreign visitors to

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[178] Kuykendall et al., *supra* note 101, at 990.

[179] *Id.*; Possley & Mills, *supra* note 99, at 15.

[180] A list of the websites for American embassies and consulates worldwide is listed at usembassy.gov. This number of American consulates in Mexico does not include "virtual presence posts."

[181] Bill Masterson, *Yanks Abroad: The Numbers Game*, The People's Guide to Mexico, http://www.peoplesguide.com/1pages/retire/work/bil-maste/%23americans.html (last visited Mar. 13, 2009).

[182] Alfredo Corchado & Laurence Iliff, *Little Americas Take Hold Across Mexico, More U.S. Citizens Putting Roots South of the Border*, DALLAS MORNING NEWS, Mar. 14, 2005, at 1A.

[183] WENNERSTEN, *supra* note 145, at 159.

Mexico in 2008—up nearly six percent from 2007.[184] Eighty percent of those visitors—about 18.4 million—were Americans.[185] Every year, 100,000 college and high school students spend their spring break in popular resort areas such as Acapulco and Cancun.[186] Tijuana alone receives fifteen to seventeen million American visitors each year, who often take daytrips or stay overnight.[187]

With such large numbers of visitors and expatriates, it is not surprising that Mexico also arrests many Americans—Mexico has more Americans in prison than any other foreign nation.[188] On the Department of State's list of top ten cities where the most Americans were arrested and taken into custody, six of them were Mexican cities.[189] Frequently these arrests occur at border checkpoints, where Americans are caught in illegal possession of alcohol, drugs, or guns.[190]

2. *The Mexican Criminal Justice System*

Like the United States, Mexico is a federation of states; the federal criminal justice system serves as a model for the criminal procedures of the individual states.[191] Many of the same principles found in the American criminal justice system and criminal procedure are also present in the Mexican criminal justice system. In general, Mexico's Constitution and Mexican law forbid the retroactive application of law and double jeopardy, while observing the concept of *nulla poena sine lege* and something similar to the American concept of due process—*formalidades esenciales del procedimiento* in Spanish.[192] The prosecutor in a criminal case must present proof that a crime was committed (*corpus delicti*, known in Spanish as *el cuerpo del delito*), with sufficient evidence showing that the suspect is

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[184] Amanda Lee Myers, *Colleges Warn Students About Mexico Travel*, ABCNEWS.COM., Feb. 26, 2009, *available at* http://abcnews.go.com/Travel/wireStory?id=6966220.

[185] *Id.*

[186] *Id.*

[187] Reynolds, *supra* note 151, at L8.

[188] LAUFER, *supra* note 1, at 10.

[189] Reynolds, *supra* note 151, at L8; *see* Table 2, *supra* Part III.A.

[190] *Id.*

[191] STEPHEN ZAMORA ET AL., MEXICAN LAW 358 (2004).

[192] *Id.* at 360–61.

probably guilty (the concept of *probable responsabilidad*, a concept that mirrors the American notion of probable cause).[193]

While in theory these safeguards exist in the Mexican Constitution and in Mexican law, in reality the application and observance of the law is hampered by many problems. Mexico's criminal legal system suffers both from internal problems within the system, and external problems that pervade modern Mexican society. Prosecutors and police forces at both the state and federal level have been frequently criticized as being corrupt, incompetent, and violent, with a reputation for violating human rights.[194] Low salaries for policemen already make it difficult to attract and retain qualified individuals; the prospect of harsh punishment, and the amount of discretion allowed to law enforcement, add to the financial incentive for individuals to pay off police officers with bribes.[195] These factors are further exacerbated by the rising power of the drug cartels and the easy availability of firearms.[196]

On the subject of search and seizure, the Mexican Constitution provides that "[n]o one shall be disturbed in his/her person . . . except by virtue of a written order from a competent authority stating the legal grounds and justification for the action taken."[197] If a suspect is not caught actually in the act of committing the crime, then legally this provision forbids warrantless

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[193] *Id.* at 361.

[194] *Id.* ("the operation of criminal justice does not always conform to the letter of the law, and the guarantees written into the Constitution are not always observed"); *see also* Tracey Eaton, *Mexico Fights Its Own Police in Drug War; Many Officers Closely Tied to the Cartels, Some Say*, DALLAS MORNING NEWS, Aug. 18, 1996, at 1A ("U.S. and Mexican authorities say the selling of police and prosecutor positions has been a standard practice in Mexico for years"); Ken Ellingwood, *U.S. Aid Offer Angers Mexico*, L.A. TIMES, June 5, 2008, at A4 (reporting on aid package to Mexico from Congress and the Bush Administration that includes provisions requiring Mexico to combat human rights violations and police corruption); Laurence Iliff, *Wanted: Honest Cops*, DALLAS MORNING NEWS, Sept. 18, 2007, at A1 (reporting that a newly established Mexican policy academy would not accept former or current police officers, or military servicemen, because they were already perceived as "tainted"); Chris Kraul & Anne-Marie O'Connor, *Kidnappings South of the Border Often Kept Quiet*, L.A. TIMES, Aug. 14, 1996, at A3 (quoting a security consultant that local police who deal with kidnappings "may be incompetent, corrupt, or both").

[195] *See* ZAMORA, *supra* note 191, at 359.

[196] *See, e.g.*, Eaton, *supra* note 194, at 30A; Randal C. Archibold, *Hundreds Arrested and Drugs Are Seized in Strike on Mexico*, N.Y. TIMES, Feb. 26, 2009, at A18; James C. McKinley, Jr., *U.S. Is a Vast Arms Bazaar for Mexican Cartels*, N.Y. TIMES, Feb. 26, 2009, at A1.

[197] MEX. CONST. art. 16. (English translation from CRIMINAL PROCEDURE: A WORLDWIDE STUDY 353 (Craig M. Bradley ed., 2d ed. 2007)).

searches and arrests.[198] Yet stops and frisks by the police are not regulated by the courts because they are not considered to be criminal procedure (the police, like everyone else, are allowed to make a citizen's arrest), and lack of guidance from the Supreme Court of Mexico has contributed to searches and seizures being conducted by the police on an arbitrary basis; therefore, stops and frisks by the police are common and not monitored.[199]

Once detained, the police (in theory) have forty-eight hours for preliminary investigations and interrogation of the detained person, up until a formal statement is made to the prosecutor.[200] Rules are set in place regarding the treatment of the detained person during this time period, but in practice they are not always observed.[201] After forty-eight hours, either the detained person must be released, or the case must be referred back to a judge.[202]

But for those forty-eight hours after arrest, the suspect may be denied counsel until he makes a statement.[203] In the United States, statements made by a suspect when he is detained and denied counsel would clearly be excluded if he was not informed of his right to remain silent;[204] American jurisprudence requires the police upon arrest or detainment of the suspect to inform him of his rights to remain silent and to counsel.[205] However, in Mexico, the prosecutor is the one who informs a detained suspect of these rights.[206] Because of the forty-eight hour investigatory period, it could be

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[198] *See* CRIMINAL PROCEDURE, *supra* note 197, at 355. There is an exception under Article 16 for making a warrantless arrest if the situation is urgent: if there is a risk the suspect may flee, or the circumstances make it impossible to obtain a warrant in time, an arrest without a warrant can be made, although a judge must verify the constitutionality of the arrest afterwards. Guillermo Zepeda Lecuona, *Inefficiency at the Service of Impunity: Criminal Justice Organizations in Mexico*, *in* TRANSNATIONAL CRIME AND PUBLIC SECURITY: CHALLENGES TO MEXICO AND THE UNITED STATES 71, 72 (John Baily & Jorge Chabat eds., 2002).

[199] CRIMINAL PROCEDURE, *supra* note 197, at 353, 355.

[200] *Id.* at 364.

[201] For example, the rules may require that food and water be provided to the detained person, but the police may withhold food and water to extract information or a confession. *Id.* at 365.

[202] Zepeda Lecuona, *supra* note 198, at 72.

[203] CRIMINAL PROCEDURE, *supra* note 197, at 365. When a detained person makes a statement before the prosecutor, however, his defense counsel must be present in order for the statement to be valid. *Id.*

[204] Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964).

[205] Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).

[206] CRIMINAL PROCEDURE, *supra* note 197, at 365.

hours before the prosecutor appears. During that time, the arrested individual, unaware of his right to remain silent and denied counsel before making a statement, could be subject to interrogation. And no official rules are set for interrogations conducted during the investigatory forty-eight hour period.[207]

Thus, unlike in the United States, being informed of the right to remain silent in Mexico may be delayed until after a suspect has already made self-incriminating statements, possibly the result of questionable—and certainly unregulated—interrogation techniques. Self-incriminating statements made under such circumstances would not be excluded from evidence—in fact, the Supreme Court of Mexico has ruled that a "detainee's initial statements are to be given *more credibility* by judges precisely because they are *obtained without prior consultation* with counsel."[208]

Most of the millions of Americans who daytrip to Tijuana are unlikely to be aware of all of these facts, much less plan on getting arrested in Mexico. The assistance American consular officers would be able to provide to detained Americans would be unlikely to get many American citizens "off the hook," but it would be essential in the effort to protect the detainee's rights—which was the goal of the VCCR in the first place. But because of *Medellín*, Mexican officials may be reluctant to allow consular access to Americans of all foreigners. With the increase in crime and violence in Mexico and the large numbers of Americans who traverse to the country, it is only a matter of time before an incident arises—and the United States will have no legal recourse to protect its own.

B. *Japan*

1. *Americans Covered by SOFA*

Japan has a reputation for being a nation of contradictions, and despite being very ethnically homogeneous, many Westerners either visit or come to live in Japan. In 2006, nearly 500,000 American tourists traveled to the country[209]; that number peaked in 2007 at 816,000,[210] and the next year, by November, there had been 713,000 American visitors.[211]

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[207] *Id.*

[208] *Id.* (citing *Thesis No. 82, Seminario Judicial de la Federación*, Appendix to Definitive Jurisprudence 1917–1971, Second Part, First Chamber, at 175) (emphasis added).

[209] *See* Michael Hassett, *U.S. Military Crime: SOFA So Good?*, THE JAPAN TIMES, Feb. 26, 2008, at 16, *available at* http://search.japantimes.co.jp/cgi-bin/fl20080226zg.html.

But in the wake of *Medellín,* Japan is also extremely significant as a destination for Americans abroad: the United States Armed Forces maintain a strong presence in the country. The Army, Marine Corps, Navy, and Air Force all maintain units throughout Japan under a Status of Forces Agreement (SOFA) between the United States and Japan.[212] The agreement provides for the Armed Forces to maintain its presence and details the treatment of service members, civil workers, and their dependents. Since at least 2006, SOFA has covered approximately 97,000 Americans in Japan each year.[213] Approximately 47,000 of those covered by SOFA are armed forces servicemen; 3,500 are civilian personnel; and 42,000 dependents and family members.[214]

American servicemen in Japan have had the benefit of being under the protection of SOFA since it was signed in 1960,[215] but over the years, a series of events have increased the negative image of the armed forces in Japan and have put pressure on the United States government to reconsider the terms of the agreement. Accusations of rape by servicemen stationed in Okinawa have been especially prevalent in the media.[216] Probably the largest controversy took place in 1995: national outrage erupted over the beating and rape of a twelve-year-old Japanese girl by three American servicemen in

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[210] *Chinese Tourist Numbers to Japan Exceed Americans*, CHINA HOSPITALITY NEWS, Feb. 5, 2008, http://www.chinahospitalitynews.com/en/2008/02/05/5648-chinese-tourist-numbers-to-japan-exceed-americans/.

[211] Japan National Tourist Organization, www.jnto.go.jp/eng/ttp/sta/PDF/E2008.pdf (last visited Sept. 22, 2009). As of early 2009, only estimates for January to November of 2008 were available—no figures were released for December.

[212] *See* U.S. Forces Japan, http://www.usfj.mil/Front%20Page/Topics%20of%20Interests/Links/US_Units_in_Japan.html (last visited Sept. 22, 2009); Hassett, *supra* note 209, at 16.

[213] *See* Hassett, *supra* note 209, at 16; Reiji Yoshida, *Basic of the U.S. Military Presence*, THE JAPAN TIMES, Mar. 25, 2008, at 3.

[214] Hassett, *supra* note 209, at 16; Yoshida, *supra* note 213, at 3.

[215] Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of U.S. Armed Forces in Japan, *available at* http://www.mofa.go.jp/MOFAJ/gaiko/treaty/pdfs/treaty164_1d.pdf (last visited Sept. 24, 2009).

[216] Okinawa, the chain of islands nearly halfway between Taiwan and southern Japan, was occupied by the United States after World War II until 1972. During the 1990s, the prefecture of Okinawa housed more than half of the United States armed forces stationed in Japan—approximately 28,000 troops in 1996—and the United States' bases took up 20% of the land. Sonni Efron, *Governor Calls Okinawa Tokyo's Beast of Burden*, L.A. TIMES, Sept. 5, 1996, at A4.

Okinawa.[217] This prompted the United States to agree to revisions in SOFA, including allowing Japanese authorities early custody of suspects of rapes and murders.[218] Since then, there have been further reports and accusations of rape or attempted rape committed by American servicemen or Americans connected to the military.[219] In addition to the public backlash caused by the rapes, in 1996 a vehicle driven by a Marine veered off the road and hit an Okinawan mother and her two children, killing all three,[220] and in 2004 a military helicopter crashed onto the grounds of a university campus.[221]

Justice certainly requires holding these perpetrators accountable for their actions in accordance with the law. But in Japan, the extreme negative publicity and the widespread public resentment against the United States military due to these previous incidents will make it much more difficult to ensure impartiality for American servicemen accused of a crime in the future. Japanese citizens—and native Okinawans in particular—have come to associate the American armed forces with crime and nuisance, building pressure on the United States government to alter how SOFA deals with situations like these.[222] This has the potential of exposing an innocent American to a resentful people, whose prejudice will lead them to determine his guilt without a fair examination of the facts.

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[217] Teresa Watanabe, *3 U.S. Servicemen Found Guilty in Okinawa Rape*, L.A. TIMES, Mar. 7, 1996, at A1.

[218] *Id.*

[219] There have been reports of rape by American servicemen in Okinawa in 2001 and 2008, attempted rape in 2000, and rape by a civilian employee in 2004. In 1996, a senior airman was charged with raping an American teenager, the daughter of an Air Force serviceman. *See DNA Matches That of Arrested U.S. Military Worker in Okinawa Rape*, JAPAN ECONOMIC NEWSWIRE, Oct. 16, 2004; *Japan Seeks Arrest of U.S. Airman*, L.A. TIMES, July 3, 2001, at A4; *Marine Held on Suspicion of Rape*, L.A. TIMES, Feb. 11, 2008, at A6; *U.S. Airman in Okinawa Charged in Teen's Rape*, L.A. TIMES, Jan. 26 1996, at A5; *U.S. Serviceman in Okinawa Arrested for Alleged Rape Attempt*, JAPAN ECONOMIC NEWSWIRE, Jan. 14, 2000, *available at* http://findarticles.com/p/articles/mi_m0XPA/is_2000_Jan_17/ai_58735652/; *Woman Gang-Raped by Foreigners, Police Say*, L.A. TIMES, June 29, 2001, at A4.

[220] *3 Okinawans Die as Marine's Car Veers onto Sidewalk*, L.A. TIMES, Jan. 8, 1996, at A6.

[221] *U.S. Copter Crashes on Campus; Local Ire Raised*, THE JAPAN TIMES, Aug. 14, 2004, at 2. The three Marines on board were injured; damage was caused to property of the university, but no one on the ground was hurt. *Id.*

[222] *See, e.g.*, Efron, *supra* note 216, at A4.

2. *Other Americans*

While the number of Americans in Japan covered by SOFA is relatively easy to ascertain, the numbers of Americans residing in Japan and not serving or connected to the military are less definitive. These numbers vary according to the source and to the year. The Japan Ministry of Internal Affairs and Communication estimated in 2005 that there were 37,000 Americans living in Japan, but its report did not specify whether this number excluded or accounted for the Americans covered by SOFA.[223] An estimate from a 2008 book puts the number of American residents at nearly 80,000.[224]

For many foreigners who want to work in Japan, a visa indicating the foreigner's employment is required; foreigners can either secure a job from outside the country before departing for Japan, or enter the country as a tourist and then change their visa status once a job is found in the country.[225] For most Americans not connected with the armed forces and with little or no knowledge of the Japanese language, the most readily available employment is to teach at *eikaiwa* schools—where English conversation is offered—or to teach at *juku*—so-called "cram schools."[226] The largest employer of foreign nationals was the *eikaiwa* corporation NOVA, which at one point employed approximately 7,000 foreigners across Japan (the majority of them worked as English instructors), until the company collapsed in 2007.[227] In addition to the private *eikaiwa* corporations, every year government ministries bring thousands of foreigners—including Americans who have recently graduated from college—to Japan to teach foreign languages, mainly English in public

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[223] Japan Ministry of Internal Affairs and Communication, Statistics Bureau, http://www.stat.go.jp/english/data/kokusei/2005/poj/mokuji.htm (last visited Mar. 13, 2009).

[224] WENNERSTEN, *supra* note 145, at 111.

[225] *See, e.g.*, Yoko Majima, *Visa and Immigration Procedure in Japan*, http://www.juridique.jp/immigration_bis.html (last visited Sept. 4, 2009).

[226] *See, e.g.*, JARRELL D. SIEFF, A PRACTICAL GUIDE TO LIVING IN JAPAN 27 (2002).

[227] Barry Brophy, *English Schools Face Huge Insurance Probe*, THE JAPAN TIMES, Apr. 12, 2005, at 14; Barry Brophy, *New Nova Hours Pose Health Risk*, THE JAPAN TIMES, May 31, 2005, at 12. The company suffered under a series of losses and scandals—including government investigations and deceptive business practices—until it finally filed for bankruptcy in October 2007, resulting in employees becoming unemployed. Many foreigners—including Americans—were owed unpaid salaries. *See Nova Files for Bankruptcy with Debt at 43.9 Billion Yen*, THE JAPAN TIMES, Oct. 26, 2007, *available at* http://search.japantimes.co.jp/cgi-bin/nn20071026z1.html (last visited Sept. 24, 2009); Richard Reed, *How Do You Say, "Stranded in Japan?"*, THE OREGONIAN, Oct. 31, 2007, at A01.

schools all over the country; in the 2008–2009 year, nearly 2,700 Americans participated in the program.[228]

In some ways, Americans who come to Japan to teach or work are more vulnerable to VCCR violations than Americans serving in the armed forces in Japan, because they do not receive the benefit of protection under SOFA or the military. It is estimated that there are about 51,000 Americans not covered by SOFA living in Japan.[229]

Japanese attitude towards Americans can vary. Among many Japanese, especially the younger generation, foreigners are considered cool, especially when the foreigner in question is blond-haired, blue-eyed, and could pass for a Hollywood actor.[230] But as a group, foreigners are an easy scapegoat for more traditional and conservative Japanese to target; representatives of the government are quick to blame foreigners for the rising crime rates in the country.[231] Americans in particular are faced with the negative impressions left by the controversies connected to the United States military[232] and lingering animosity dating back to the era of World War II.

3. *The Japanese Criminal Justice System*

Although generally a low-crime nation, the number of reports of crime in Japan has been rising since 1991.[233] When looking at the number of

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[228] The JET Programme, http://www.jetprogramme.org/e/introduction/statistics.html (last visited Mar. 13, 2009). The JET Programme is not a private *eikaiwa* corporation but a government-sponsored exchange program, administered by the Ministry of Internal Affairs and Communications (MIC), the Ministry of Foreign Affairs (MOFA), and the Ministry of Education, Culture, Sports, Science and Technology (MEXT). Foreign languages are required for most junior high and high school students in Japan, with English being the most popularly taught; most JET participants are foreigners from English-speaking countries who are placed in rural towns and villages to assist in public schools. The status of JET participants differs from that of *eikaiwa* instructors in that JET teachers are technically employees of the local municipalities in which they are placed, making them more akin to government employees.

[229] *See* Hassett, *supra* note 209, at 16.

[230] *See, e.g.*, Trevor Clarke, *Times Get Tough for Teachers*, THE JAPAN TIMES, Mar. 28, 2006, at A1 ("'If the [foreigner] was blond, blue eyes, and regardless of whether they spoke English very well, then basically they got hired'").

[231] *See* CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 98 (2d ed. 2008); *see also* LAW IN JAPAN: A TURNING POINT 338 (Daniel H. Foote ed., 2007).

[232] *See supra* Part IV.B.1.

[233] *See* RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY 387 (5th ed. 2003).

foreigners who commit crimes in Japan and are subsequently arrested, the estimates appear to be relatively straightforward. In 1986, the police cleared 2,500 *rainichi gaikokujin hanzai*—crimes police determined were committed by foreigners.[234] By 1995, that number had risen to more than 17,000 crimes.[235] In looking at just the violent crimes in those same years, there were ninety-four committed by foreigners in 1986 and 247 in 1995.[236] This coincides with the increase in numbers of foreign visitors to Japan, which doubled between 1982 and 1992.[237] Between 1992 and 2001, the number of *rainichi gaikokujin hanzai* had increased fivefold.[238] In 1999 the number of foreign visitors arrested for committing crimes in the country represented only 2.2% of the total number of people arrested in Japan, but in 1999 foreigners made up more than 17% of the group of people sent to prison.[239]

Trying to determine how many of these foreigners arrested were American citizens has not been so straightforward, as the information has largely been presented without reference to the nationalities of the perpetrators, only that they were foreigners. In 2006, Americans were known to commit 331 penal code offenses: 120 were by SOFA-covered Americans, and 211 by non-SOFA Americans.[240] Of the special law violations from the same year, twenty-five were committed by SOFA-covered Americans and eighty-four by non-SOFA Americans. These numbers are relatively small, when compared to the number of crimes committed: 380,000 penal code offenses nationwide, of which 14,000 were committed by non-Japanese, and 83,000 special law violations, of which 12,000 were committed by non-Japanese.[241] As crime and the foreign population have risen over the years, this has led the general population—and the police in particular—to view foreigners with more suspicion; this carries the risk that, in searching for the perpetrator of a crime, the police may make incorrect assumptions about a foreigner and act on them.

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234 LAW IN JAPAN: A TURNING POINT, *supra* note 231, at 338, 351.

235 *Id.* at 338.

236 *Id.*

237 TERRILL, *supra* note 233, at 387.

238 LAW IN JAPAN: A TURNING POINT, *supra* note 231, at 351.

239 *Id.* at 338–39.

240 Penal code offenses include crimes such as murder, bodily injury, and theft, as opposed to a "special law violation," which is a violation of certain laws in Japan such as the controlled stimulants law or the firearm law. Hassett, *supra* note 209, at 16.

241 *Id.*

Japan is a group-oriented society.[242] As opposed to the United States, where individuality is valued, the group is the predominate concern in Japanese culture, and this is evinced in the Japanese criminal justice system. In the United States, society prefers that many guilty people go free instead of one innocent person be imprisoned, but in a society that places such emphasis on the group as Japan does, the criminal justice system is designed for the greater good to prevail, even over individual rights.[243] The presumption in the United States is that the defendant is innocent until proven guilty; in Japan, it is the reverse: suspects are normally presumed guilty.[244]

Although the Japanese Constitution was heavily influenced by ideals also found in American jurisprudence,[245] Confucian notions also influence the judiciary system: instead of the idea of people possessing rights, people are thought to possess a duty to be loyal and obedient to their superiors, and a person should seek to be in harmony with society as a whole.[246] While the American criminal justice system relies primarily on procedural safeguards to protect defendants' rights, the Japanese system focuses more on substantive justice—which "may not be what actually is at work in the system," especially when it comes to American defendants.[247] All of this can bear down on innocent people made to confess.

The safeguards placed in the Japanese Constitution are not effective as deterrents against behavior by the police that many Americans would consider improper. In the United States, although the police may ask random questions of anyone on the street, there is no duty for anyone to answer;[248] in Japan, when a police officer questions a random person on the street, that individual is thought to be under an obligation to cooperate.[249] The criminal code actually gives the police broad powers to arrest an individual without a

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[242] *See, e.g.*, TERRILL, *supra* note 233, at 374, 410.

[243] *See* GOODMAN, *supra* note 231, at 395.

[244] *See id.*

[245] *See id.* at 381; TERRILL, *supra* note 233, at 376. For example, provisions included in the Japanese Constitution include prohibitions against unreasonable searches, self-incrimination, the right to counsel and a speedy and public trial. *See* GOODMAN, *supra* note 231, at 381; TERRILL, *supra* note 233, at 413.

[246] *See* TERRILL, *supra* note 233, at 395.

[247] GOODMAN, *supra* note 231, at 387.

[248] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 34 (White, J., concurring).

[249] *See, e.g.*, L. CRAIG PARKER, JR., THE JAPANESE POLICE SYSTEM TODAY 64 (2001) (describing an incident illustrating "the ease with which Japanese police can make inquiries at their own discretion (a privilege that would be the envy of American police)").

warrant.[250] Once a suspect is arrested, he can be held by the police for interrogation for up to twenty-three days, during which the suspect may be held almost incommunicado, subject to constant interrogation, with no right to access counsel; that right does not exist until after an indictment is issued, and even if a suspect obtains counsel, his access or communication with his attorney will most likely be severely limited or censored by the police.[251] If the police want to continue the detention beyond the initial twenty-three days, they can obtain an arrest warrant from a judge and re-arrest the individual; courts in Japan are known to be very deferential to the police.[252]

The police make frequent use of hard-hitting interrogation tactics as criminal cases in Japan are almost exclusively built not on evidence or investigation, but by getting the accused to confess to the crime.[253] Such tactics have been the subject of much criticism and even allegations that there may be violations of human rights taking place.[254] This reliance on confessions, strengthened by the fact that plea bargaining does not exist in Japan and that prosecutors will bring only cases they are confident of winning, is the major drive of Japanese criminal prosecutions: 99.8–99.9% of all defendants who go to trial are convicted.[255] In 1990, the percentage of trials in which the defendant was a foreigner was only one percent, but that had grown to ten percent by 2000.[256] Of course, the cases where prosecutors are most confident in getting a convictions are the ones where the suspect confessed—regardless of whether the confession is true or not.[257] Prosecutors and judges have been criticized also for compounding the situation, as acquittals are considered to reflect badly on both groups: the prosecutors criticized for supporting the police's tactics, and the judges criticized for constantly deferring to the prosecutors.[258] Although judges

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[250] *See* TERRILL, *supra* note 233, at 389.

[251] *Id.*; Norimitsu Onishi, *Pressed by Police, Even Innocent Confess in Japan*, N.Y. TIMES, May 11, 2007, at A1.

[252] TERRILL, *supra* note 233, at 389.

[253] *Id.*; Onishi, *supra* note 251, at A1.

[254] TERRILL, *supra* note 233, at 389.

[255] Onishi, *supra* note 251, at A1; GOODMAN, *supra* note 231, at 396. In the United States, more than 90% of federal criminal cases are settled by plea bargains. *Id.* at 391.

[256] DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 181, n.3 (2002).

[257] *See, e.g.*, Onishi, *supra* note 251, at A1 (recounting specific incidents where courts found the confessions of imprisoned defendants to be false after concluding the defendants had been coerced).

[258] *See* TERRILL, *supra* note 233, at 390; Onishi, *supra* note 251, at A1.

have the discretion to exclude illegally obtained evidence, Japan has no exclusionary rule and judges "virtually never" exclude.[259]

With such factors in its criminal justice system, access to consular officers in Japan is crucial—not just to assist the detainee through the system, but to prevent and monitor abuses by the police. Foreign suspects are less likely to confess than native Japanese while being interrogated,[260] which makes it possible that they would be subject to even harsher techniques than the police usually use. Foreigners are not only easy scapegoats, they are the usual suspects in Japan, and because the police enjoy great deference from the courts and society in general, they have nothing to lose in detaining the suspect for the full twenty-three days and attempting to extract a confession from him. Consular access could mitigate these risks until the Japanese criminal system can be reformed. But despite the criticism of Japan's justice system, substantive reform is unlikely to happen soon as the general public still harbors concerns about the increase in crime and the police still maintain a place of respect in society.

V. IS THERE A SOLUTION AFTER *MEDELLÍN*?

The legal implications of *Medellín* are still developing; the VCCR remains in force with the United States still a signatory (having withdrawn only from the Optional Protocol), and since the decision was released in March 2008, no new VCCR violations have been raised before the ICJ. Many years could pass before anything new develops in the area of consular relations norms in international law.

It may be a long time before the United States is able to repair the damage done to its global reputation by *Medellín* and the series of cases that preceded it.[261] After declaring it would comply with the VCCR in the future in both *LaGrand* and *Avena*, the United States has very little credibility after *Medellín*.[262] The *Medellín* line of cases not only hurt the United States' standing on the international stage, they also burnt the bridges of any legal argument the United States may have wanted to assert in case its own citizen was denied consular access under the VCCR; the fact that the United States

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[259] GOODMAN, *supra* note 231, at 396.

[260] *See* JOHNSON, *supra* note 256, at 269.

[261] *See supra* Part II.C.

[262] Donald Francis Donovan, a New York City attorney, was quoted as saying: "It is imperative that the international community understand that when the United States gives its word, the United States will keep its word." David G. Savage, *Advice of Consul: In Two Major Treaty Rulings, the Roberts Court Has Drawn the Line at the Border*, 94 A.B.A. J. 24, 24–26 (2008).

also withdrew from the Optional Protocol also cuts off the United States' ability to bring its own VCCR violations before the ICJ for enforcement.[263] To rehabilitate its position after *Medellín*, the United States must therefore seek to restore its position in two areas: it must seek new legal means through which the United States may assert the right for detained Americans to access consular assistance, and it must rebuild its international reputation and credibility.

Both aims could be accomplished by Congress taking a carrot approach. Congress and the President could pass legislation encouraging states to incorporate consular rights for foreign suspects into their own laws in exchange for certain types of related federal funding.[264] For example, Congress could encourage states to tack onto the *Miranda* warnings the notification that foreign defendants have the right to contact their consulate.[265] However it is done, the real thrust behind this solution would be that the *states* themselves take action on consular rights; Congress can encourage the states to pass their own legislation, but it cannot force them to

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[263] In the recent cases involving the journalists, even if the United States had not withdrawn from the Optional Protocol, it would not have been able to rely on the ICJ for relief anyway. *See supra* note 7. In the case of American student Amanda Knox, the United States could have theoretically brought suit against Italy, but there has been no claim of wrongdoing committed by Italian authorities regarding Knox's consular rights. *See supra* note 6.

[264] Currently, only California has legislation that provides for consular notification for foreign defendants:

> [E]very peace officer, upon arrest . . . or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country . . . . If the foreign national chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified.

CAL. PENAL CODE § 834c(a)(1) (Deering 2008). However, there is no penalty for noncompliance. *See* Jean Guccione, *Citizens of Other Countries Detained in the U.S. Can Seek Help From Their Homelands, but the Results Have Been Mixed*, L.A. TIMES, Nov. 16, 2001, at B2.

An attempt was made in Texas to pass legislation that would have required local police to notify foreign consulates whenever one of their nationals was arrested; the bill was approved by the Texas Senate Criminal Justice Committee, but the bill ultimately did not pass. Press Release, Texas State Senator Rodney Ellis, Senator Ellis on Supreme Court decision in *Medellin v. Texas* (Mar. 31, 2008), http://www.senate.state.tx.us/75r/Senate/Members/Dist13/pr08/p033108a.htm (last visited Sept. 24, 2009).

[265] *See, e.g.*, *Avena*, 2004 I.C.J. at 44.

comply with the VCCR.[266] This kind of action would avoid conflicts of authority between the federal government and the states, which was one point of contention in *Medellín*.[267] Once Congress and the President have passed such legislation, the United States could once again ratify the Optional Protocol—this time, with Congress using language clearly indicating that it intends the Protocol to be binding domestically, thereby avoiding another point of contention in *Medellín*—and restore the status quo from *Avena*. Legal recourse under the VCCR and the Optional Protocol would be re-established and the obstacles enumerated by the majority in *Medellín* would be overcome. Also, the global community would perceive that the United States takes its responsibilities under the VCCR seriously after all, restoring the United States' position as a constructive, active member of the international legal community.

But as ideal it would be for Congress to pass such legislation, and for all fifty states to comply, such a solution is highly unlikely, if not impossible. After *Medellín*, several Democrats in the House of Representatives attempted to pass legislation that would have made the ICJ's order in *Avena* enforceable; the bill never made it past the Judiciary Committee, and no other attempts since then have been made in Congress.[268] Thus, Congress passing carrot-type legislation also seems doubtful; even if Congress could pass it, there would be no guarantee that all fifty states would take the carrot and pass their own laws. Also, Congress would have to craft whatever standards it wanted to impose on the states carefully, if it wanted a uniform structure for consular rights and remedies for violations. Ultimately, if the states are to allow for consular access at all, then the federal government must encourage them.

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[266] *See, e.g.*, Printz v. United States, 521 U.S. 898, 912 (1997) (citing New York v. United States, 505 U.S. 144 (1992)).

[267] There is actually a federal regulation from the Immigration and Naturalization Service in place that lists more than sixty other nations that have bilateral agreements with the United States calling for "immediate communication with appropriate consular or diplomatic officers." 8 C.F.R. § 236.1(e) (2008). However, this regulation is limited to when foreign nationals are detained in *removal proceedings*, which are exclusively the province of the federal government. Notably, neither Mexico nor Japan are listed as having such an agreement with the United States. The regulation was codified as 8 C.F.R. § 242.2(e) until 1997.

[268] It was H.R. 6481, known as the Avena Case Implementation Act of 2008. *See* Jeffrey Davidow, Editorial, *Protecting Them Protects Us*, L.A. TIMES, Aug. 4, 2008, at A15; GovTrack.us, http://www.govtrack.us/congress/bill.xpd?bill=h110-6481 (last visited Mar. 13, 2009).

VI. CONCLUSION

Many Americans may be surprised to learn that, when they travel abroad, they are not treated as Americans. There are many protections and benefits taken for granted within the United States that are missed as soon as an American finds himself in a dire situation abroad. Like the rest of the population, the Supreme Court appears to have taken all this for granted when it decided *Medellín v. Texas*.

As the globalization of the world increases, the United States' relationships with other nations become critical in obtaining cooperation on many different fronts. Cooperation with Mexico is necessary to combat growing problems related to drugs and drug cartels. Fostering good relations with Japan helps ensure that the United States military maintains strong presences with close proximity to North and South Korea. The United States owes a massive debt to China. Several nations have assisted the United States with the war in Iraq by sending the troops that formed the Multinational Force. This is only a short description of the United States' interests being dependent on other nations; clearly, American interests are best served when the United States can rely on global cooperation.

In *Breard, LaGrand,* and *Avena*, we saw what happened to foreign defendants on death row in the United States. Reversing the situation, when an American abroad is arrested, it is more likely for a minor offense, and unlikely for committing a serious crime, such as the grisly murders committed in *Breard, LaGrand*, and *Medellín*; as such, it is less likely he would be sentenced to death.[269] But the American has more serious worries ahead: due process and human rights in many nations are not so readily observed as in the United States, and remedies for violations of such are not so readily available. An American arrested in a foreign country would not be entitled to the benefit of a fair and impartial trial as foreign defendants in the United States receive most of the time. Unlike foreign defendants in the United States, who have raised VCCR violations as desperate attempts to avoid the death penalty, Americans will have to worry about their safety and their rights *regardless* of the punishment imposed.

The issue of consular rights after *Medellín* was never about whether consular access would actually have significantly made a difference in the outcomes of foreign nationals' criminal cases in the United States, or whether consular access could actually "save" Americans from the criminal system of the receiving nation. In *LaGrand*, for example, Germany was not attempting to overturn the LaGrand brothers' convictions or release them from prison, or even to get their death sentences overturned; Germany was

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[269] Drug-related crimes would be an exception. *See supra* Part III.A.

merely attempting to get their case heard on the merits before the ICJ. The goal of the VCCR was not to preempt local judicial authority over criminal cases involving foreign defendants, but to provide some protection for foreign detainees who may otherwise be exposed to abuse. There is no doubt that access to American consulates could be crucial to an American sitting in a foreign prison. To be able to provide such protection to its citizens, the United States needs to convince the rest of the world that America is serious about honoring its international obligations, so that when the time comes for the United States to insist on other nations to respect international norms, it will actually have standing to do so.